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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1905.

No. 91.

FRED H. KOLZE, Administrator of the estate of Friedrich Kolze, deceased; LINA KOLZE; LOUISA KOLZE et al.,
Appellants,

vs.

CHARLOTTE E. HOADLEY,
Appellee.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR APPELLANTS.

JOHN T. RICHARDS,
SOLICITOR FOR APPELLANTS.

BARNARD & MILLER, PRINT, CHICAGO.

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BRIEF AND ARGUMENT FOR APPELLANTS.

MAY IT PLEASE THE COURT:

This suit was brought in the Circuit Court by the complainant, Charlotte E. Hoadley, stated to be a citizen of Massachusetts, against the defendants, all of whom were at the commencement thereof citizens of Illinois, for the purpose of foreclosing three trust deeds, each securing the payment of three promissory notes, each for six hundred ($600.00) dollars, in all fifty-four hundred ($5,400.00) dollars, given by Abraham L. Day, a citizen of Illinois.

The Amended Bill filed November 20, 1903, after setting forth that the complainant was a citizen of Boston, and the defendants all citizens of Cook County, Illinois, alleges (Original Rec., p. 4) that

on November 15, 1897, one Friedrich Kolze, a resident of Cook County, Illinois, was the owner of certain premises in Cook County Illinois, thereinafter described; that while he was such owner he and his wife, by warranty deed conveyed said premises, and other property, to Abraham L. Day, at a stated consideration of forty-five thousand ($45,000.00) dollars, which deed was duly acknowledged and recorded (Rec., p. 4½); that as part consideration for said conveyance said Kolze was to receive one thousand ($1,000.00) dollars in cash, a portion of which was in fact paid, and the balance in notes secured by trust deeds on various parts of premises so sold; that to secure a portion of such purchase price said Abraham L. Day executed and delivered his nine principal promissory notes dated November 17, 1897, payable to the order of himself and by him endorsed, for the sum of six hundred ($600.00) dollars each, with interest at seven per cent per annum, copies of said notes being attached to said amended bill (Rec., p. 5); that to secure the payment of said notes the said Abraham L. Day, a bachelor, made and executed three certain trust deeds to Charles E. Stade, as Trustee, conveying certain premises (describing them); that said trust deeds were duly acknowledged and recorded, copies of the same being attached to said amended bill of complaint; that each of said trust deeds provided that if default be made in the payment of said notes, or in case of waste or non-payment of taxes, or breach of covenants therein contained, the whole of said principal sum might, at the option of the legal holder, become immediately due and payable, and said Trustee might take possession of said premises, collect the rents therefrom

and file a bill or bills in any court having jurisdiction for the foreclosure of the same; that out of the proceeds of sale under such foreclosure, the costs of suit, including solicitors' fees, and expenses of said trust, should first be paid, and the balance applied toward the payment of said notes. (Rec., p. 9 and 10.)

Said amended bill further alleged that the said sale and conveyance by Kolze to Day, was negotiated by said Stade, a nephew of said Kolze; that at the date of said sale, and for a long time subsequently thereto, Kolze had confidence in said Stade, and trusted him implicitly in the transaction referred to; that after the recording of said warranty deed from Kolze to Day, and the execution by Day of said nine notes and three trust deeds, the said Kolze was then the owner of said notes and trust deeds, and as such owner entrusted the same, which were negotiable by delivery, to said Stade, his trusted agent, for safe keeping (Rec., p. 11); that while the same were in the custody of said Stade as agent of Kolze, but with all the indicia of ownership, said complainant, Charlotte E. Hoadley, advanced or secured to be advanced a large sum of money upon the note of Stade, secured to be paid by the pledge of said nine notes and three trust deeds, as collateral security therefor; that the note of said Stade was not paid in whole or in part, and that said collateral was thereafter sold under the terms of said collateral note, and was bid in by and became the property of said complainant, so that she was then the legal owner and holder thereof; that after the execution of said notes and trust deeds securing the same, by said Day, he, said

Day, reconveyed said premises to Kolze (Rec., p. 12); that thereafter, by release deed duly acknowledged and recorded, said Stade, Trustee, fraudulently released said three trust deeds to said Kolze, said release deed reciting that the same was made for and in consideration of one dollar and other valuable considerations; alleges that the indebtedness secured by said trust deed and evidenced by said notes had not been paid or canceled; that said release deed was fraudulent, and should be decreed to be void as against said complainant as owner of said notes and trust deeds; that the same should be set aside and said three trust deeds declared to be valid liens upon said premises, and that unless said trust deeds be set aside the amount of said securities would be lost to said complainant. (Rec., p. 13.)

Said amended bill further alleges that about the time of the execution and delivery of said release deed by said Stade, the said Kolze and wife made, executed and delivered their certain warranty deed conveying said premises and other property to the defendant Louisa Kolze, a daughter of grantors, at an expressed consideration of twelve thousand ($12,000.00) dollars; that said grantee was not a *bona fide* purchaser, but that said conveyance was made to her to hold for the benefit of the family; that she was chargeable with notice of the facts thereinbefore stated and took whatever interest she acquired in said premises subject to the lien of said trust deeds securing the notes held by said complainant; that thereafter, for the ostensible purpose of securing the payment of part of the purchase money, said Louisa Kolze made, executed and de-

livered to said Friedrich Kolze her promissory note for ten thousand ($10,000.00) dollars, secured by trust deed to Percy V. Castle, as Trustee, and Arista B. Williams, as successor in trust (Rec., p. 14) which trust deed was duly acknowledged and recorded; that the defendant Fred H. Kolze, as administrator of the estate of Friedrich Kolze, deceased, is the owner and holder of said note and trust deed, but that such interest is in all respects subject to the rights of said complainant.

Said amended bill further alleges (Rec., p. 15) that said complainant has under the option granted her in said trust deed, on the date of the commencement of said suit, declared said notes to be due and payable, and that there is due to said complainant the full amount of said notes and interest thereon; that there is due the further sum of three hundred ($300.00) dollars as solicitors' fees; that complainant is without remedy save in a court of equity, and asks that defendants be required to answer, that said release deed be declared fraudulent and set aside, that the rights of all the defendants be declared to be in all respects subject to the rights of said complainant; that a receiver be appointed and an accounting taken (Rec., p. 16); and the defendants be decreed to pay whatever sum should be found to be due; that in default of such payment said premises be sold; that execution issue for any balance remaining due complainant after such sale; that the defendants be forever barred and foreclosed of all right and equity of redemption in said premises; that such other relief be granted as equity might require and that summons issue for said defendants. (Rec., p. 17.)

Certain of the defendants, now the appellants in this court, appeared and filed their written motion (Rec., pp. 28 and 29) to have dismissed said amended bill for want of jurisdiction, as apparent from original bills of complaint, and from said amended bill, because it did not appear either from said original bills or from said amended bill that the proper diversity of citizenship existed at the commencement of said suits, thereafter consolidated, between Friedrich Kolze, alleged in said amended bill to have been the original owner of said notes and trust deeds, or said Charles E. Stade, therein alleged to be his trusted agent in the premises, the assignors of said complainant, and the defendants, or any of them, so as to confer jurisdiction upon said Circuit Court; which said motion was thereafter overruled (Rec., p. 30) and defendants given leave to elect whether to stand by said motion or plead to said amended bill; that thereafter said defendants filed their plea to said amended bill, which set forth (Rec., p. 32) that said court ought not to take cognizance of said amended bill of complaint, because they, said defendants, and said defendant Abraham L. Day, were at the time of the filing of the bills of complaint in said suits, thereafter consolidated, and at the time of the filing of said plea still were, each and all citizens of the State of Illinois; that said suit was brought by said complainant as assignee of one William P. Smith, who had theretofore obtained said notes and trust deeds from defendant Stade, to recover the contents of certain choses in action, namely, the promissory notes of said Day, secured by said trust deeds to Stade; that said complainant did not advance a large

sum of money upon the note of said Stade, alleged to have been the trusted agent of said Kolze, secured to be paid by the pledge of said notes and trust deeds as collateral security therefor, as in said amended bill alleged; that on the contrary, the said notes and trust deeds signed by said Day were deposited by said Stade with said William P. Smith or other person acting for him, to secure the payment of a note for one thousand ($1,000.00) dollars signed by Stade, payable to the order of said Smith, and also to secure said Smith for the faithful performance by Stade of a certain contract of employment; that upon the failure of said Stade to pay said note and carry out said contract, the said nine notes and three trust deeds signed by said Day, were thereupon bid in and became the property of said complainant; that said Stade and Smith, the successive assignors of said complainant, were each and both at the time of the filing of said bills, and still were at the time of filing said plea, citizens of the State of Illinois, the same state of which said Day, the maker of said notes and trust deeds, was a resident, and were not citizens of the State of Massachusetts (Rec., p. 33); that said suit to recover the contents of said choses in action, to wit, said promissory notes and trust deeds signed by said Day, could not have been prosecuted by said Stade or said Smith, in said Circuit Court of the United States, if no assignment or transfer of the same had been made; said plea concluding by praying judgment whether said defendants should be compelled to make any further answer to said amended bill.

The Circuit Court held said plea insufficient, and

the defendants were ruled to answer said amended bill (Rec., p. 35), but failing to answer they were defaulted (Rec., p. 38) and a decree was thereafter entered by which the court found (Rec., p. 39) that it had jurisdiction of the parties to said cause, and of the subject-matter thereof; that the material allegations in said amended bill of complaint were true; that the notes and trust deeds described in said bill were duly executed; that said Stade, as trustee, had fraudulently and wrongfully released said trust deeds; ordered the release deed set aside as to said trust deeds, and declared said trust deeds to be valid first liens upon the premises therein described (Rec., p. 40); found that the rights of Louisa Kolze, subsequent grantee under warranty deed from Friedrich Kolze, and of Fred H. Kolze as administrator of the estate of Friedrich Kolze, deceased, owner of said promissory note for ten thousand ($10,000.00) dollars, secured by trust deed to Percy V. Castle, Trustee, were in all respects subject and subsequent to the rights of said complainant, as the owner of said notes and trust deeds signed by Day (Rec., p. 41.) The decree then found the amount due said complainant as owner of said notes and trust deeds, and provided that unless the same should be paid within five days from the entry of said decree, said premises should be sold, and the proceeds, after the payment of court costs, be applied toward the payment of said indebtedness, and directed that unless redemption should be made from said sale according to the laws of the State of Illinois, a master's deed should be executed and delivered to the legal holder of the certificate of sale, and that the defendants be

forever barred and foreclosed from all equity of redemption and claim in said land. (Rec., p. 48.)

Upon the entry of said decree the defendants who had sought to have said bill dismissed, filed their petition for appeal and assignment of errors (Rec., p. 49) solely on the question of jurisdiction, which was granted (Rec., p. 51), and afterward perfected said appeal by filing their certain appeal bond (Rec., p. 55), which was thereafter duly approved (Rec., p. 57.) It was stipulated (Rec., p. 52) as to what portions of the record should be transcribed and filed in and certified to this court; which stipulation contained the agreement of the parties to the suit that the original bills of complaint in said cause contained no other or different jurisdictional matters than were contained in the said amended bill of complaint. Rec., p. 53.)

SPECIFICATION OF ERRORS.

The Circuit Court erred,

I.

IN OVERRULING THE WRITTEN MOTION TO DISMISS THE AMENDED BILL OF COMPLAINT FOR WANT OF JURISDICTION. (Rec., p. 31.)

II.

IN HOLDING THE PLEA OF THE DEFENDANTS TO THE JURISDICTION TO BE INSUFFICIENT (Rec., p. 35); and

III.

IN ENTERTAINING JURISDICTION OF THE PARTIES AND SUBJECT-MATTER, AND ENTERING A FINAL DECREE ON THE MERITS. (Rec., p. 36.)

BRIEF.

* * * "Nor shall any Circuit nor District Court have cognizance of any suit except upon foreign bills of exchange to recover the contents of any promissory note or other chose in action, in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents, if no assignment or transfer had been made."

1 Sec. Act of March 3, 1887, c. 373, 24 Stat. 552, as corrected by Act of August 13, 1888, c. 886, 25 Stat. 433.

This section has received the following construction:

"The Circuit Court shall have no jurisdiction over suits for the recovery of the contents of promissory notes or other choses in action brought in favor of assignees or transferees, except over (1) suits upon foreign bills of exchange; (2) suits that might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made, and (3) suits upon choses in action payable to bearer and made by a corporation."

Newgass v. *New Orleans,* 33 Fed. Rep., 196.

New Orleans v. *Quinlan,* 173 U. S. Rep., 191.

Foster's Federal Practice, 3 ed., vol. 1, p. 82.

The phrase "suits to recover the contents of a chose in action" includes suits to foreclose mortgages.

Black on Mortgages, p. 567.
Foster's Fed. Prac., vol. 1, p. 83.

"Hence when mortgagor and mortgagee are citizens of same state, an assignee of the mortgagee, though a citizen of another state, cannot maintain a bill for foreclosure in the federal courts."

Black on The Law of Mortgages and Deeds of Trust, p. 567, citing:
Sheldon v. *Sill*, 8 How. (U. S.) 441;
Shoecraft v. *Bloxham*, 124 U. S., 730;
Blacklock v. *Small*, 127 U. S., 96;
Hill v. *Winne*, Fed. Cases, No. 6503.

"Where federal jurisdiction is dependent upon the citizenship of the plaintiff's assignor at time of commencement of suit, the citizenship of the latter must affirmatively appear somewhere in the record."

Robertson v. *Cease*, 97 U. S., 649.
Anderson v. *Watt*, 138 U. S. 702.
North American Trans. Co. v. *Morrison*, 178 U. S., 267.

The defect is ground for a motion to dismiss at any stage of the proceedings.

Florida Cent. R. R. Co. v. *Bell*, 176 U. S., 327.
Blackburn v. *Portland Gold M. Co.*, 175 U. S., 574.
Municipal Ins. Co. v. *Gardiner*, 62 Fed. Rep., 954.

But the court should of its own motion dismiss the suit whenever it discovers the defect.

N. Amer. Trans. Co. v. *Morrison,* 178 U. S., 267.

"If in any suit commenced in a circuit court, or removed from a state court to the Circuit Court of the United States, it shall appear to the satisfaction of said Circuit Court at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

Act of 1875, 18 U. S. Stat. at Large, 472, c. 137.

The dismissal in accordance with the above section may be ordered upon motion of the defendant or by the court of its own motion.

Wetmore v. *Ryder,* 169 U. S., 120.

Nashua, etc., Ry. Co. v. *Boston,* 136 U. S., 356, 374.

Mexican Cent. R. R. Co. v. *Pinkney,* 149 U. S., 200.

Lake Co. Commrs. v. *Dudley,* 173 U. S., 243.

The design of the act of 1875 was to impose a peremptory duty to dismiss whenever it is properly made to appear that the court has no jurisdiction.

Lake Co. Commissioners v. *Dudley,* 173 U. S., 243.

Morris v. *Gilmer,* 129 U. S., 315 (325).

Anderson v. *Watt,* 138 U. S., 694.

It is the duty of the Supreme Court on appeal to see that the jurisdiction of the Circuit Court has in no respect been imposed upon.

Morris v. *Gilmer, supra.*

Nashua, etc., Ry. v. *Boston, supra.*

ARGUMENT.

It is contended by appellants:

I.

THAT THE COMPLAINANT IS AN ASSIGNEE OF A CHOSE IN ACTION WITHIN THE MEANING OF THE FIRST SECTION OF THE ACT OF MARCH 3, 1887, AS CORRECTED BY ACT OF AUGUST 13, 1888.

II.

THAT THE CIRCUIT COURT WAS BOUND, EITHER ON MOTION OF THE DEFENDANTS OR OF ITS OWN MOTION, TO DISMISS THE SUIT WHENEVER THE WANT OF SUFFICIENT JURISDICTIONAL AVERMENTS IN COMPLAINANT'S PLEADING WAS MADE TO APPEAR, AND THAT UPON ITS FAILURE SO TO DO, IT IS THE DUTY OF THIS COURT, ON APPEAL, TO THUS DISMISS IT.

III.

THAT THE SUIT IS NOT, IN EFFECT, ONE BROUGHT BY THE ENDORSEE OF NOTES AGAINST THE ENDORSERS, WITHIN THE MEANING OF THE DECISIONS RELIED ON BY APPELLEE AND HEREINAFTER REFERRED TO.

I.

Charlotte E. Hoadley, the complainant below, a citizen of Massachusetts, filed this suit against Abraham L. Day and others to recover the amount of Day's nine promissory notes by foreclosure and sale of real estate under the three trust deeds securing them. She alleges (Rec., p. 11) that Friedrich Kolze, previously stated to have been a resident of Illinois on November 15, 1897 (Rec., p. 4½), was the owner of the three trust deeds and nine notes given by Day; that Kolze intrusted them to his agent, Stade; that while the same were in the custody and keeping of Stade, with all the indicia of ownership, complainant advanced or caused to be advanced a large sum of money upon the note of Stade, secured by a pledge of the above-mentioned notes and trust deeds of Day as collateral, and that upon the failure of Stade to pay his note, the collateral, i. e., the notes and trust deeds sought to be foreclosed, were sold and bid in by complainant, who brings the suit as the legal holder and owner thereof. In other words, complainant on her own statement is the purchaser of the interest of Kolze, who, she alleges, originally owned the notes and trust deeds, and is not herself the first holder of these securities, the payment of which she seeks to enforce in this suit, for it was not until April 21, 1899, that she became the owner of them (Rec., p. 33), and they were executed by Day on or about November 17, 1897 (Rec., p. 18.) In whose possession were they during this period of nearly a year and a half? By referring to the

Amended Bill, we see that it was on February 17, 1898, that the notes and trust deeds were pledged by Stade (Rec., p. 11), and upon reading the plea we find that on that date he obtained a loan of one William P. Smith for one thousand ($1,000.00) dollars, giving Smith his collateral note for that amount, with which he deposited the nine notes and three trust deeds of Day as collateral (Rec., p. 32.) Complainant, it seems, had advanced the money to Smith. From that date until April 21, 1898, Smith, as pledgee, held the legal title to the collateral, subject to its being divested by payment of the note which it secured. But Stade did not pay the note to Smith, and the collateral was sold and was purchased by complainant. Thus it is evident that four persons, three of them by assignment, successively had title of some kind to these securities, viz.: (1) Kolze, the original owner; (2) Stade, his agent, who had possession of them with all the indicia of ownership, as complainant says (Rec., p. 11); (3) Smith, the pledgee, who might have maintained an action to collect them, and (4) Mrs. Hoadley, the complainant. And not from one of the first three, all her assignors, could complainant have derived the right to commence suit in the Circuit Court for they were all citizens of the State of Illinois, as was Day, the maker.

It will be observed that the section of the statute quoted above as enacted March 3, 1887, is substantially the same as the original section of the Judiciary Act of 1789, in force when the case of *Sheldon* v. *Sill,* hereinafter referred to, was decided, except that the present act contains the additional exception, not applicable here, in regard to choses in ac-

tion payable to bearer and made by a corporation. Both the original Judiciary Act and the present act restrain Circuit Courts from taking cognizance of any suit except upon foreign bills of exchange, to recover the contents of any promissory note, or other chose in action in favor of any assignee, unless a suit might have been prosecuted in such court to recover the contents, if no assignment had been made.

But on March 3, 1875, Congress enacted a new act which provided that "no Circuit * * * Court shall have cognizance of any suit founded on a contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, *except in case of promissory notes, negotiable by the law merchant.*" This excepted all suits on all negotiable instruments, whereas the original Judiciary Act and the Act of 1887, now in force, excepts only suits on foreign bills of exchange. The Act of 1875 remained in force until March, 1887, and during that period of twelve years were decided the cases of *Tredway* v. *Sanger*, 107 U. S., 323; *Allen* v. *McDonald* (C. C.), 28 Fed., 17; *Mersman* v. *Werges*, 112 U. S., 139, and *Seckel* v. *Backhaus*, Fed. Cases, No. 12,599 (7 Biss., 354), all of which hold that the Circuit Court *did* have jurisdiction of a suit between citizens of different states to foreclose a mortgage made to secure payment of a negotiable promissory note of which the plaintiff was indorsee, even though the payee and mortgagee was a citizen of the same state with the mortgagor at the commencement of the suit. But these cases, of course, have no bearing in construing the present act, the meaning of which has, however,

been very clearly set forth in the cases of *Newgass* v. *New Orleans,* 33 Fed. Rep., 196, and *New Orleans* v. *Quinlan,* 173 U. S. Rep., 191.

In *Sheldon* v. *Sill,* 8 Howard (U. S.), 441, decided when the act in force regulating the jurisdiction in suits of this character was substantially as at present, Mr. Justice Grier, in delivering the opinion of the court said:

"In equity, the debt or bond is treated as the principal, and the mortgage as the incident. It passes by the assignment or transfer of the bond and is discharged by its payment. It is, in fact, but a special security, or lien, on the property mortgaged. The remedy obtained on it in a court of equity is not the recovery of land, but the satisfaction of the debt. It is the pursuit by action of one debt on two instruments or securities, the one general, the other special. The decree is that the mortgaged premises be sold to pay the debt, and if insufficient for that purpose, that the complainant have further remedy, by execution, for the balance. The complainant in this case is the purchaser and assignee of a sum of money, a debt, a chose in action, not of a tract of land. He seeks to recover by this action a debt assigned to him. He is therefore the 'assignee of a chose in action' within the letter and spirit of the Act of Congress under consideration, and cannot support this action in the Circuit Court of the United States, where his assignor could not."

That reasoning certainly applies with all its force to this case. Neither Kolze nor Stade nor Smith, all citizens of Illinois, could have brought the suit in the Federal Court against Day and the other defend-

ants, because all were citizens of Illinois. It is nowhere alleged, nor has it been claimed, that complainant was either *beneficially or equitably entitled* to the contents of the notes and trust deeds at their inception, and, therefore, if she was the owner at the commencement of the suit, it must have been as assignee, and as her assignor, whether he was Kolze or Stade or Smith, could not have brought the suit in the Circuit Court, neither could she.

In *Hill* v. *Winne,* Federal Cases No. 6503, also a foreclosure, the suit was dismissed for want of jurisdiction, because complainant's assignor was a citizen of the same state as were the defendants.

It has been argued by counsel for appellee in the court below, and doubtless will be here, that this suit is not primarily to recover the contents of promissory notes, but to remove the cloud of the alleged fraudulent release. Why, then, did complainant pray for all the relief ever asked in a foreclosure suit?

Just such a contention was made in the case of *Blacklock* v. *Small,* 127 U. S., 96, where, as here, the mortgage had been released and it was claimed the mortgagee had violated his duty in making such release, and it was asked that the satisfaction of the mortgage be annulled and set aside and then that plaintiff might have a decree for payment to them by the mortgagor of the amount due, and for a sale of the mortgaged premises. But the court said (p. 104):

> "The bill is clearly one for a decree against Small for the amount of the bond, and for a foreclosure of the mortgage and a sale of the mortgaged premises."

II.

The amended bill states that the notes and trust deeds foreclosed in this proceeding were first owned by Friedrich Kolze (Rec., p. 10), and that complainant advanced money upon and subsequently purchased the same, but does not anywhere state that Friedrich Kolze was at the commencement of the suit a citizen of any other state than Illinois, or that he could have brought the suit in the Federal Court if no assignment or transfer of the notes and trust deeds had been made. In the absence of such an allegation the Circuit Court was utterly without jurisdiction.

It was said by Mr. Justice HARLAN, in the case of *Robertson* v. *Cease*, 97 U. S., p. 649, and reiterated by Mr. Chief Justice FULLER in *Anderson* v. *Watt*, 128 U. S., 703:

> "As the jurisdiction of the Circuit Court is limited in the sense that it has none except that conferred by the constitution and laws of the United States, the presumption now, as well as before the adoption of the Fourteenth Amendment, is, that a cause is without its jurisdiction unless the contrary affirmatively appears. In cases where jurisdiction depends upon the parties, such citizenship, or the facts which in legal intendment constitute it, should be distinctly and positively averred in the pleadings, or they should appear affirmatively and with equal distinctness in other parts of the record."

To the same effect is *N. Amer. Trans. Co.* v. *Morrison*, 178 U. S., 267. Nowhere in this record is there any allegation as to the citizenship of Friedrich Kolze, original owner of the notes and trust deeds,

at the commencement of this suit. The defendants' motion to dismiss for want of jurisdiction should, therefore, have been granted. It was not within the court's discretion as to whether under the facts as stated the suit should or should not have been dismissed, but the Act of 1875, from which I have quoted in the brief, requires that in such a case the court *shall* dismiss the suit.

But the Circuit Court having failed to dismiss the suit, it becomes the duty of this court to do so. As was said by Mr. Chief Justice FULLER in *Anderson* v. *Watt, supra,* quoting from the opinion in *Bernards Township* v. *Stebbins,* 109 U. S., 341, 353:

> "It has been the constant effort of Congress and of this court to prevent the discrimination in respect to suits between citizens of the same state and suits between citizens of different states, established by the constitution and laws of the United States, from being evaded by bringing into the federal courts controversies between citizens of the same state."

Just as obnoxious, of course, is a suit, like this, brought by a citizen of one state whose assignor is a citizen of the same state as the defendants.

III.

Counsel for appellee cited in the argument in the Circuit Court the following cases in support of his contention that the suit, in effect, was one brought by the endorsee of notes against the endorsers, and that the citizenship of the endorser governs rather than that of the maker, in determining whether the court has jurisdiction, which cases I shall briefly review.

In the case of *Superior City* v. *Ripley,* 138 U. S., 93, there was a formal written order by the contractors on the city for a portion of the proceeds of the contract; an acceptance of the order by the city, and an agreement in writing by the city to pay the persons named in the contract; and it was on this order and acceptance that the city was sued, and not on the original contract between the city and the drawer of the order. It was held that the acceptance of the order constituted a new contract between the acceptor and payee, to which the drawer was not a party, and that the payees in the order being non-residents, might bring suit directly against the acceptor of the order without regard to the residence of the original contractors. In the case at bar there is no new contract on which suit is brought, but the original contracts, *i. e.,* the notes and trust deeds, are sought to be enforced. The case, therefore, is not in point.

In *Bushnell* v. *Kennedy,* 76 U. S., 387, the jurisdiction of the Circuit Court was sustained on the ground that as the case was removed from the State to the Federal Court, another section of the Act instead of the one herein relied on, governed. Certain remarks of the court as to the construction of the Act in question seem to indicate that a distinction was made between notes, bonds and other written contracts, which might be said to have contents, and claims for damages for breach of contract—that the restriction against the bringing of suits by assignees applies to the former and not to the latter, to which belonged the chose in action sued on in that case. In the case at bar of course the cause of action is by virtue of written contracts, containing promises to pay money.

In the case of *Holmes* v. *Goldsmith*, 147 U. S., 150, upon which much emphasis was laid by counsel, the payee in the notes had advanced no money or property, but had induced three men to sign a note to his order, upon which, after endorsing the same on the day of its date, and waiving demand, notice and protest, he was paid the amount of the note by plaintiffs. Upon this contract of endorsement the suit was brought against the signers of the note without joining the endorser, and it was held that where it is necessary to maintain the jurisdiction of the Circuit Court in an action on a promissory note, to show that the plaintiff, who appeared to be an endorsee or assignee, was in point of fact the payee, it might be done. It was further held that Owens, the nominal payee and endorser, was in legal effect, a maker of the note; that he received the proceeds of the loan effected through the note, and had no right of action against the nominal makers, and having no right of action could not be regarded as an assignor within the meaning of the Judiciary Act. How different from the case at bar, where Kolze, Stade and Smith as pledgee, successively had rights of action, though not in the Federal Courts, against Day, the maker, and consequently must be regarded as complainant's assignors within the meaning of the Judiciary Act. It was only by reason of Day's subsequent conveyance of the land, which in no way affected the notes and trust deeds held by complainant, and complainant's willingness to forego a deficiency judgment against him, that her counsel were enabled to dismiss the suit as to Day (Rec., 37), but of course retaining as a party defendant Louisa Kolze, the then present

holder of the title. Because Day conveyed the premises back to Friedrich Kolze, who thus became in effect the mortgagor, counsel has argued that there is no intermediate party between complainant and Friedrich Kolze, endeavoring in this way to liken this suit to those already referred to between indorsee and indorser, apparently forgetting that it is between Kolze, in his capacity as the first holder and owner of the Day notes, and complainant, that the intermediate parties come in. As a matter of fact, Kolze, and later the administrator of his estate, were parties simply because Kolze owned the trust deed and note afterward given by Louisa Kolze, the subsequent purchaser, and not because complainant claimed any right of action against him on the notes and trust deeds of Day sought to be foreclosed.

So in the case of *Wachusett Nat. Bank* v. *Sioux City Stove Works,* 56 Fed. Rep., 321, it was held that no right of action was ever vested in or belonged to the payee named in the notes; that therefore in transferring the notes to the plaintiff it did not assign a cause of action held or owned by it, but acted simply as the agent of the defendant in procuring the loan; that no cause of action arose on the notes until plaintiff advanced the money thereon, and became an original party to them. But in the case at bar Kolze did have a cause of action on the notes which complainant subsequently acquired for a valuable consideration from Stade and Smith. Complainant here does not and can not contend that she advanced the consideration for which the notes were given, which was part of the purchase price of the

farm. Therefore, the Goldsmith and Wachusett Bank cases are not in point here.

Steele v. *Rathbun*, 42 Fed. Rep., 391.

I believe that this court after careful consideration will reverse the ruling of the Circuit Court, with directions to dismiss the suit for want of jurisdiction, and assess the costs against the appellee here, the complainant in the Circuit Court.

Respectfully submitted,

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